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No. 88-389

In the Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
APPELLANT

v.

JUNE M. BETTS

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING APPELLEE

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QUESTION PRESENTED

Whether an employee benefit plan that bars employees who become disabled after age 60 from receiving disability benefits is sheltered from liability under the Age Discrimination in Employment Act by Section 4(f)(2) of the Act, 29 U.S.C. 623(f)(2), which allows employers to observe the terms of a "bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the Act, where the employer has not shown that the discrimination is justified by economic considerations.

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INTEREST OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, generally proscribes discrimination against employees age 40 and older. This case involves the meaning of Section 4(f)(2) of the Act, 29 U.S.C. 623(f)(2), which authorizes employers to observe the terms of employee benefit plans in certain circumstances even though older employees are disadvantaged as a result. The Equal Employment Opportunity Commission (EEOC) enforces the ADEA (29 U.S.C. 626) and has issued regulations concerning the meaning of the exception at issue (29 C.F.R. 1625.10). Accordingly, the EEOC has a substantial interest in the resolution of the question presented.[1]

[1] This case does not affect the federal government as an employer, because under 29 U.S.C. 630(b) it is not an "employer" for purposes

STATEMENT

Appellee June Betts was hired by the Hamilton County, Ohio, Board of Mental Retardation and Developmental Disabilities in 1978 at age 55. In 1985, when she was 61, Betts' employer determined that she could no longer perform her job for medical reasons and informed her that she could either retire or be placed on medical leave with no pay and no medical benefits. J.S. App. A23. Had she been under 60, she would have had a third option: disability retirement. That option was foreclosed to her, however, because of a provision in Ohio's pension law preventing persons over 60 from receiving disability pensions and allowing them to receive only regular age retirement pensions. Betts chose to retire and is currently receiving retirement benefits of $158.50 per month (*id.* at A24). If she had been eligible for disability retirement, she would receive $355.02 per month (*ibid.*).[2]

The district court concluded that appellant, the Public Employees Retirement System of Ohio (PERS), had impermissibly discriminated against Betts because of her age. Section 4(a)(1) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623(a)(1), provides that "[i]t shall be unlawful for an employer to * * * discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." The Ohio employee benefit plan, the

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of the statutory provision at issue. A separate and self-contained section of the ADEA, 29 U.S.C. 633a, governs federal agencies. *Lehman* v. *Nakshian*, 453 U.S. 156, 168 (1980).

[2] The difference between ordinary retirement benefits and disability retirement benefits in Bett's case comes about because of a provision added to Ohio Rev. Code Ann. § 145.36 (Anderson 1982 & Supp. 1987) in 1976, which states that "[i]n no case shall a disability retirement benefit be less than thirty per cent * * * of [an employee's] final average salary."

court stated, is contrary to Section 4(a)(1) because "[o]n its face and in its effect, the disability retirement plan denies benefits to certain employees because they are sixty years of age or older." J.S. App. A23.

The district court rejected PERS' claim that its age-based denial of disability benefits was protected under Section 4(f)(2) of the ADEA, 29 U.S.C. 623(f)(2), which provides that "[i]t shall not be unlawful for an employer * * * to observe the terms of * * * any bona fide employer benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the Act. The court agreed with the EEOC's interpretative regulation, which construes this provision to " 'permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations.' " J.S. App. A28, quoting 29 C.F.R. 860.120(a)(1) (1969) (currently designated 29 C.F.R. 1625.10(a)(1)). Here, the court concluded, the discrimination "is not justified by significant cost considerations and therefore, it is not the type of plan contemplated by the exception." J.S. App. A29.[3]

A divided court of appeals affirmed. J.S. App. A2-A19. It agreed with the Seventh Circuit that " 'where, as in the present case, the employer uses age—not cost, or years of service, or salary—as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of' " Section 4(f)(2). J.S. App. A5, quoting *Karlen*

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[3] The district court also concluded that because Betts was disqualified from obtaining disability benefits she had been forced to retire involuntarily. The court therefore held that PERS had violated Section 4(f)(2)'s proscription against "requir[ing] or permit[ting] the involuntary retirement of any individual * * * because of the age of such individual." J.S. App. A30-A32. The court of appeals did not address that conclusion.

v. *City Colleges of Chicago*, 837 F.2d 314, 319 (7th Cir.), cert. denied, No. 87-1831 (June 6, 1988). Here, the court concluded, "[d]espite having every opportunity, the defendants declined to introduce any cost figures or other economic justification for the different treatment of employees over sixty." J.S. App. A6.

SUMMARY OF ARGUMENT

PERS discriminated against Betts on account of her age, as she would receive more than double the amount of the benefits she currently receives if she had become disabled before, rather than after, turning 60. It is undisputed that, in the absence of Section 4(f)(2), PERS would be liable under Section 4(a)(1) of the ADEA.

From the time of the enactment of the ADEA to the present, the two federal agencies that have administered the Act have consistently interpreted Section 4(f)(2) as requiring some sort of cost justification in order to permit an employer to avoid a charge of discrimination. 29 C.F.R. 860.120(b) (1969) (34 Fed. Reg. 9709 (1969)) (Department of Labor regulation); 29 C.F.R 1625.10(a)(1) (current EEOC regulation). That construction is fully consistent with the language of the provision. In enacting Section 4(f)(2), Congress meant to shield employee benefit plans that disadvantage older employees only where employers present reasonable economic justifications for doing so. This conclusion draws support from Congress's use of the phrase "such as a retirement, pension, or insurance plan." The thread common to those sorts of plans is that they entail costs that typically increase as employees age. *EEOC* v. *Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir.), cert. denied, 469 U.S. 820 (1984); *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984). Alternatively, the cost-justification rule can be derived from the requirement that a plan not serve a "a subterfuge to evade the purposes of" the Act. One purpose of the ADEA is to

abolish arbitrary discrimination against older employees, *i.e.*, discrimination that has no foundation in legitimate cost differences between older and younger employees. *EEOC* v. *City of Mt. Lebanon*, 842 F.2d 1480 (3d Cir. 1988); *Cipriano* v. *Board of Education*, 785 F.2d 51 (2d Cir. 1986).

The legislative history also supports the conclusion that employers must provide an economic justification before they may discriminate against older employees in the provision of an employee benefit. Senator Javits, who introduced the amendment that became Section 4(f)(2), explained at the time he introduced it that it was intended to allow employers to provide different benefits to older employees "because of the often extremely high cost of providing certain types of benefits to older workers." 113 Cong. Rec. 31,254-31,255 (1967), *reprinted in* U.S. Equal Employment Opportunity Commission, *Legislative History of the Age Discrimination in Employment Act* 145-146 (1981). Since the exception was intended to authorize employers to grant lesser benefits to older employees where benefits are more costly to provide to those employees, it is sensible to require employers to provide a cost justification for their discrimination in order to invoke Section 4(f)(2).

The courts below correctly concluded that PERS is not shielded by Section 4(f)(2) because it has offered no economic justification whatever to explain why persons who become disabled before age 60 are entitled to greater benefits than employees who become disabled after turning 60. PERS argues that it need not offer any justification for its discriminatory treatment because Congress intended to allow employers to discriminate in the provision of employee benefits as long as the discrimination is not a cover for forcing older employees to retire. But neither the language of the statute nor its legislative history provides support for the contention that Congress intended to grant

employers the right to discriminate arbitrarily in the provision of employee benefits except in that limited circumstance. Finally, there is no merit to PERS' suggestion that its plan is protected because it was established prior to the enactment of the ADEA, since the discriminatory provision at issue was added in 1976, after the ADEA took effect.

ARGUMENT

OHIO'S PUBLIC EMPLOYEES RETIREMENT SYSTEM VIOLATED THE AGE DISCRIMINATION IN EMPLOYMENT ACT BY DISQUALIFYING BETTS FROM RECEIVING DISABILITY BENEFITS SOLELY ON ACCOUNT OF HER AGE SINCE IT PROVED NO ECONOMIC JUSTIFICATION FOR ITS DISCRIMINATORY TREATMENT

A. The Public Employees Retirement System Discriminated Against Betts By Denying Her Disability Benefits

The Ohio statute at issue, Ohio Rev. Code Ann. § 145.35 (Anderson 1982 & Supp. 1987), is discriminatory on its face, as it provides that only employees who have "not attained age sixty" may apply for disability benefits. The statute thus conflicts with Section 4(a)(1) of the ADEA, 29 U.S.C. 623(a)(1), which makes it unlawful for employers to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of the individual's age." There is no question that the application of Section 145.35 had a discriminatory effect here, since the monthly retirement benefit that Betts initially received was less than half of the amount of the disability benefit that she would have received if she had not been barred from applying for those benefits. Indeed, under the Ohio Public Employees Retirement System a recipient of disability benefits does not cease to receive those benefits after reaching age 60; consequently, if Betts had become eligible to obtain disability

benefits at age 59, she would continue to receive at least 30 percent of her salary after she turned 60 rather than the lesser retirement benefit that she receives instead. In short, an employee disabled before age 60 is treated significantly differently than an employee disabled after age 60 even if the younger and older employees have identical years of service, identical disabilities, and identical salaries. Thus, this case involves disparate treatment of an employee on account of her age.

B. The EEOC's Regulations Properly Interpret Section 4(f)(2) To Shelter Provisions In Employee Benefit Plans Reducing The Amount Of Benefits Paid To Older Employees Only Where Economic Considerations Justify Such Treatment

The dispositive question is whether the disparate treatment afforded Betts under Ohio law is protected under Section 4(f)(2), which authorizes an employer to observe the terms of "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the Act. The federal agencies charged with enforcement of the ADEA have long construed this provision to permit age-based differentials in employee benefits only where such differences are justified by significant cost considerations. That construction is consistent with both the language of Section 4(2)(f) and its purposes, as revealed by the legislative history. The lower courts therefore correctly ruled that PERS may not rely on Section 4(f)(2) unless it can demonstrate a significant cost justification for its refusal to extend disability retirement benefits to persons over age 60.

1. Shortly after the enactment of the ADEA in 1967, the Department of Labor, which originally administered the Act, issued an interpretation of Section 4(f)(2). That interpretation allowed employers to discriminate against older employees in the provision of employee benefits

where the cost of such benefits was more expensive for older employees. It stated: "[A]n employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does younger workers, where the plan is not a subterfuge to evade the purposes of the Act. A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits or insurance coverage." 29 C.F.R. 860.120(a) (1969); 34 Fed. Reg. 9709 (1969). Thus, as the Department understood Section 4(f)(2) shortly after its enactment, it permitted, for example, employers to contribute $100 annually towards the purchase of term life insurance for all employees, even though $100 would buy twice as much coverage for a 35-year-old employee as it would for a 55-year-old employee.

The Department also understood that Section 4(f)(2) did *not* authorize discrimination against older employees with respect to benefits that were not more costly to provide older employees. Noting that "[n]ot all employee benefit plans but only those similar to the kind enumerated in section 4(f)(2) of the Act come within this provision," the Department opined that in the normal case Section 4(f)(2) would not shield discrimination against older employees under the terms of profit-sharing plans. 29 C.F.R. 860.120(b) (1969); 34 Fed. Reg. 9709 (1969). Thus, in the Department's view, by the phrase "employee benefit plan such as a retirement, pension, or insurance plan" in Section 4(f)(2) Congress limited the exception to plans where the cost of providing benefits increases as employees age.

In 1979, the responsibility for enforcing the ADEA was transferred from the Department of Labor to the EEOC.

Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978). The EEOC adopted the Department of Labor's interpretation of Section 4(f)(2). The current EEOC regulations state that "its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations." 29 C.F.R. 1625.10(a)(1). Like the Department of Labor's 1969 regulations, the EEOC's regulations provide that "[a] benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage" (*ibid.*).

Thus, the agencies responsible for administering the ADEA have consistently agreed – from the time of its enactment more than twenty years ago to the present – that Section 4(f)(2) is designed primarily to permit cost-justified discrimination against older workers in the provision of employee benefits. This Court has relied on "the consistent interpretation of the administrative agencies charged with enforcing" the ADEA. *Western Air Lines* v. *Criswell,* 472 U.S. 400, 412 (1985); see also *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944). "[T]he EEOC's cost justification requirement constitutes the type of long-standing and contemporaneous agency interpretation deserving recognition." *EEOC* v. *City of Mt. Lebanon,* 842 F.2d 1480 (3d Cir. 1988).

2. The interpretation of Section 4(f)(2) adopted by the federal agencies charged with its enforcement is fully compatible with the statutory language. The cost-justification requirement can be derived either from the phrase "bona fide employee benefit plan such as a retirement, pension, or insurance plan," as some courts have held, or it can be viewed as implicit in the requirement that a plan not be "a

subterfuge to evade the purposes of" the Act, as other courts have suggested. Whichever phrase is given primary emphasis, the courts of appeals agree that the cost-justification standard is supported by the statutory language.

When Congress adopted the "safe harbor" provision codified as Section 4(f)(2), it listed as illustrative examples of the type of benefit plans it had in mind retirement, pension, and insurance plans. A common feature of such plans is that they tend to entail costs that rise with the age of the beneficiary. To be sure, the costs of providing benefits to older employees under retirement, pension, and insurance plans do not always increase as the age of employees increases. But they commonly do. Most obviously, it costs more to obtain term life insurance as employees age. In addition, health insurance may be more expensive to obtain for older employees. And it might be more expensive to provide the same defined benefit under a retirement or a pension plan to an employee who began work at age 55 than to an employee who began working at a much younger age. See 113 Cong. Rec. 31,255 (1967), *reprinted in* U.S. Equal Employment Opportunity Commission, *Legislative History of the Age Discrimination in Employment Act* 146 (1981).

The Third Circuit in *EEOC* v. *Westinghouse Electric Corp.*, 725 F.2d 211, 224, cert. denied, 469 U.S. 820 (1984), agreed that Section 4(f)(2) incorporates an "age-related cost factor," and it grounded that requirement in the phrase "bona fide employee benefit plan such as a retirement, pension, or insurance plan."[4] In *Westinghouse*, the employer had refused to provide layoff benefits

[4] The Department of Labor similarly emphasized in 1969 that "[n]ot all employee benefit plans but only those similar to the kind enumerated in section 4(f)(2) of the Act come within this provision." It therefore concluded that Section 4(f)(2) would not shield discrimination against older employees in the provision of profit-sharing benefits

to employees age 55 and over because they qualified for retirement benefits (*id.* at 214-215). The court of appeals noted that it was "aware that the words 'such as a retirement, pension or insurance plan' were added in a descriptive sense" to Section 4(f)(2) (*id.* at 224). However, the court stated, "their description contains substance" (*ibid.*). As the court stated, those sorts of plans are "indicative of the *types* of plans in which Congress intended to allow age discrimination; they are of the type whereby the cost of benefits increases with age," since "[t]he thread common to retirement, insurance and pension plans * * * is the age-related cost factor" (*ibid.*).

Similarly, the Ninth Circuit in *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390, 1396 (1984), concluded that "Borden's severance pay policy is not an 'employee benefit plan such as a retirement, pension, or insurance plan.' " The court explained that Congress "meant to encourage the hiring of older workers by relieving employers of the duty to provide them with equal benefits—where equal benefits would be more costly for older workers" (*ibid.*). Since severance benefits do not vary depending on the age of the worker, the Ninth Circuit, following the Third Circuit's approach in *Westinghouse*, held that the employer's severance pay policy was "a 'simple fringe benefit,' outside the scope of" Section 4(f)(2) (*id.* at 1397).[5]

because the cost of providing those benefits does not increase as employees age. 29 C.F.R. 860.120(b) (1969); 34 Fed. Reg. 9709 (1969).

[5] The discrimination here is not excused because, while denying Betts disability benefits, PERS has provided her with lesser benefits of a type listed in the statute. The employees in *Westinghouse* who were denied layoff benefits were also provided retirement benefits, but the court properly concluded that the fact that the layoff plan "is tied to Westinghouse's Pension Plan does not negate the fact that it is more analogous to a 'fringe benefit' than to the types of employee benefit plans covered under 4(f)(2)." 725 F.2d at 225. Moreover, even if a

Other courts of appeals have emphasized Section 4(f)(2)'s requirement that a plan not be "a subterfuge to evade the purposes of" the Act.[6] As in any other disparate treatment case, the question whether an employer's discriminatory treatment of older employees is a subterfuge must focus on whether the employer had a valid reason for its action or whether its stated reason is a pretext for proscribed behavior. Thus, courts must determine whether the employer's motive was nonpretextual. Cf. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). In the context of Section 4(f)(2), this means the employer must demonstrate a legitimate business reason for treating older employees less generously than younger employees. As a rule, that will generally require the employer to show that it is more expensive to provide the benefit in question to older employees.

Like this case, *EEOC* v. *City of Mt. Lebanon,* 842 F.2d 1480, 1484 (3d Cir. 1988), involved a plan under which older employees were barred in some circumstances from receiving disability benefits, and had to settle for lesser retirement benefits. The court stated that the question presented was whether the employer "created the plan as a subterfuge to evade the ADEA prohibition of age discrimination" (*id.* at 1488). It concluded that Congress enacted Section 4(f)(2) because it "recognized the greater expense incurred by employers providing benefit programs for older employees," and decided that "employers should be relieved of the obligation of providing older employees

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plan is of the sort enumerated in the statute, that does not mean that *any* discrimination against older employees under the terms of the plan, no matter how arbitrary, should be excused.

[6] The EEOC's current regulations provide that "a plan or plan provision which prescribes lower benefits for older employees on account of age is not a 'subterfuge' within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations." 29 C.F.R. 1625.10(d).

with benefits equal to benefits for younger employees when it would be more costly to do so" (*id.* at 1489). Accordingly, the court held that "[i]n order to 'cost justify' a reduced level of benefits for older employees, and thereby disprove subterfuge, an employer must establish a connection or nexus showing how general cost savings data supports the extent of reductions in its particular plan" (*id.* at 1492). Similarly, the Second Circuit in *Cipriano* v. *Board of Education,* 785 F.2d 51, 57, 58 (1986), concluded that an incentive plan under which an employer gave bonuses to employees between 55 and 60 if they retired, but did not offer similar bonuses to older employees, was a " 'subterfuge to evade the purposes of the Act' " in the absence of evidence showing a legitimate business reason for discriminating against the older employees.[7]

While the courts of appeals have emphasized different language in the text of Section 4(f)(2), they have generally agreed that where "the employer uses age—not cost, or years of service, or salary—as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of section 4(f)(2)." *Karlen,* 837 F.2d at 319; Pet. App. A5. That conclusion is fully warranted by the language of Section 4(f)(2) which limits its coverage to certain types of employee benefit plans characterized by age-

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[7] The Second Circuit in *Cipriano* stated that it "would not wish to be understood as endorsing every detail of the regulations." 785 F.2d at 58. However, it held that an employee benefit plan that discriminated against older employees would not be protection by Section 4(f)(2) in the absence of a showing by the employer that it had "a legitimate business reason for structuring the plan as it did" (*ibid.*). The Second Circuit thus plainly rejected PERS' position, which is that it may discriminate against older employees in the provision of employee benefits as long as it does not try to force them to retire. See App. Br. 26, 48.

related costs ("a plan such as a retirement, pension, or insurance plan"), and by the language that proscribes plans that undermine the basic antidiscrimination rationale of the Act (a plan that is "a subterfuge to evade the purposes of" the Act).[8]

3. If there were any doubt about whether the EEOC's cost-justification standard is consistent with the statutory language, that doubt is resolved by the legislative history. As introduced by Senator Yarborough in 1967, Section 4(f)(2) of the bill that became the Age Discrimination in Employment Act provided only that it would not be unlawful for an employer "to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act." S. 830, § 4(f)(2), 90th Cong., 1st Sess., *reprinted in* U.S. Equal Employment Opportunity

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[8] At the end of its opinion in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 203 (1977), this Court stated that it found nothing to indicate that Congress intended to require an employer that established a retirement plan long before the enactment of the ADEA "to show an economic or business purpose in order to satisfy the subterfuge language in the Act." Contrary to appellants (Br. 22), we do not think that that statement has binding force following Congress's enactment of the 1978 amendment to Section 4(f)(2) negating the holding in *McMann*. Pub. L. No. 95-256, § 2(a), 92 Stat. 189. In any event, the statement appears to have been tied to the situation presented in that case, where the discriminatory provision had been added to the plan at issue prior to the enactment of the ADEA. Here, in contrast, the discriminatory provision in Ohio law was added in 1976, after the ADEA was enacted and after it was amended to apply to the States. Thus, no pre-ADEA provision is involved here. See pages 25-26, *infra*. Furthermore, the Court in *McMann* did not focus on the language of Section 4(f)(2) referring to plans "such as a retirement, pension, or insurance plan" or the legislative history showing that Congress plainly intended to require employers to provide an economic justification where lesser benefits are provided to older employees, but instead focused on the question presented in that case. See pages 14-20, *infra*.

Commission, *Legislative History of the Age Discrimination in Employment Act* [hereinafter *Legislative History*] 68 (1981). The bill as introduced made no reference to any circumstance that might authorize employers to discriminate against older employees in the provision of benefits. The drafters of the bill, which was termed the administration bill, probably thought such a provision unnecessary because the 1965 report of the Secretary of Labor on the problems of older employees noted that "[r]elatively few employers * * * cited the costs of providing pension and insurance benefits as significant barriers to employment of older persons." Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964, *The Older American Worker: Age Discrimination in Employment* 16 (1965), *reprinted in Legislative History* at 33.

Senator Javits, however, thought that employers *were* concerned about the cost of providing some types of employee benefits to older persons. He criticized the administration bill for "not provid[ing] any flexibility in the amount of pension benefits payable to older workers depending on their age when hired." *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare* [hereinafter *Senate Hearings*], 90th Cong., 1st Sess. 27 (1967). In his view, "faced with the necessity of paying greatly increased premiums," employers might "look for excuses not to hire older workers" (*ibid.*).

Senator Smathers, a cosponsor of the administration bill, shared this concern. He agreed with Senator Javits that "[a]s presently drafted, the bill would probably be interpreted to require that workers hired for the first time between the ages of 45 and 65 be given the same private pension rights and other fringe benefits that workers are

given who began with the employer at younger ages, thus ignoring the fact that providing fringe benefits for the former can be expensive." *Senate Hearings* at 29-30. He therefore suggested an amendment "somewhat along the lines of the following: * * * Nothing in this Act shall be construed to make unlawful the varying of coverage under any pension, retirement, or insurance plan or any plan for providing medical or hospital benefits or benefits for work injuries, where such variance is necessary to prevent the employer's being required to pay more for coverage of an employee than would be required to provide like coverage for his other employees" (*id.* at 30).

The next day, Senator Javits stated on the floor of the Senate that he would seek to amend the administration bill in a way that incorporated his and Senator Smathers' concerns. The proposed amendment, which was similar to Section 4(f)(2) as ultimately enacted, provided that it would not be unlawful for an employer "to observe a seniority system or any retirement, pension, employee benefit, or insurance plan, which is not merely a subterfuge to evade the purposes of this Act." 113 Cong. Rec. 7077 (1967), *reprinted in Legislative History* at 72. Senator Javits explained that under his amendment "an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, *because of the often extremely high cost of providing certain types of benefits to older workers,* actually be discouraged from hiring older workers." 113 Cong. Rec. 31,254-31,255 (1967), *reprinted in Legislative History* at 145-146 (emphasis added). According to its drafter, therefore, a key purpose of Section 4(f)(2) was to allow employers to pay lesser benefits to older employees where it cost more to provide those benefits to older persons. See also 113 Cong. Rec. 34,746 (1967) (employers need not provide "special and

costly benefits" to older employees) (remarks of Rep. Daniels), *reprinted in Legislative History* at 157).

Senator Javits' amended version of Section 4(f)(2) had another effect as well. In a colloquy with Senator Javits, Senator Yarborough asked: "Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee * * * will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement." 113 Cong. Rec. 31,255 (1967), *reprinted in Legislative History* at 146. Senator Javits agreed that his amendment protected an employer in such a situation from a claim that it discriminated against older employees who would not be eligible to participate in the pension plan (*ibid.*). See also H.R. Rep. 805, 90th Cong., 1st Sess. 4 (the exception permits "employment without necessarily including such [older] workers in employee benefit plans" (1967), *reprinted in Legislative History* at 78; 113 Cong. Rec. 34,746 (1967) (older employees need not "be included in all employee benefit plans") (remarks of Rep. Daniels), *reprinted in Legislative History* at 157).[9]

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[9] PERS notes (Br. 37) that Senator Javits believed that the ADEA was not the place to "fight[ ] the pension battle." See 113 Cong. Rec. 7076 (1967), *reprinted in Legislative History* at 71. By that remark, Senator Javits was not suggesting that any type of discrimination in the provision of employee benefits should be permissible under the ADEA. Rather, he was aware that some pension plans in existence then had very long periods before benefits vested, such as the 20-year period in the plan hypothesized by Senator Yarborough, and he thought that such requirements should be changed by comprehensive pension legislation rather than by an age discrimination statute. A major change made by the Employee Retirement Income Security Act of 1974 (ERISA), of which Senator Javits was a sponsor, was that en-

Thus, in addition to allowing employers to decrease the amount of benefits paid to older employees where it costs more to provide those benefits to them, Senator Javits' version of Section 4(f)(2) was intended to allow employers to bar older employees from participating in certain plans altogether when they could not work for the employer long enough to qualify for participation in the plan. The decision to permit employers to enforce waiting periods for the vesting of pension benefits, like the decision to allow them to provide reduced benefits in some circumstances, was based on economic considerations. The amounts employers must pay into certain employee benefit plans, such as defined benefit pension plans,[10] depends on actuarial predictions of the amounts that ultimately will have to be paid in benefits. It would upset the predictions on which contributions had been based, and the actuarial soundness of some plans, if a large number of employees previously thought to be ineligible for pensions suddenly became entitled to benefits.[11]

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titlement to benefits paid by qualified pensions plans must vest partially after five years of service and totally after ten years of service. 29 U.S.C. 1053.

[10] Defined benefit plans are pension plans where retirees receive a fixed amount per month based on factors such as final salary and years of service. They differ from defined contribution plans, under which an employer regularly contributes a percentage of an employee's compensation to an account, and the employee is entitled to the account upon retirement. See 29 U.S.C. 1002(34) & 1002(35).

[11] PERS (Br. 33) and amicus National Public Employers Labor Relations Association (Br. 29) note that Senator Smathers' suggested amendment, which expressly authorized variation in employee benefits where it is more expensive to provide certain benefits to older employees, was not enacted. Contrary to their suggestion, however, that in no way implies that Congress rejected his concerns. Senator Smathers never actually proposed an amendment to the Senate, but instead suggested at a hearing language "somewhat along the lines of

The concern with costs that animated the original enactment of Section 4(f)(2) was confirmed in 1978, when Congress amended Section 4(f)(2) by adding a clause providing that no employee benefit plan may "require or permit the involuntary retirement of any individual * * * because of the age of such individual." Pub. L. No. 95-256, § 2(a), 92 Stat. 189.[12] The purpose of the amendment was to overturn the result in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 193 (1977), where this Court held that involuntary retirements were permitted by Section 4(f)(2). In so ruling, the Court stated that it had found "nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before its passage, or

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the following." *Senate Hearings* at 30. Senator Javits plainly understood his amendment, which borrowed its reference to pension, retirement, and insurance plans from Senator Smathers' suggestion, to accomplish the result Senator Smathers desired, as he stressed that where the "high cost of providing certain types of benefits to older workers" exceeded the cost of providing those benefits to younger employees, employers would "not be compelled to afford older workers *exactly the same* pension, retirement, or insurance benefits." 113 Cong. Rec. 31,255 (1967), *reprinted in Legislative History* at 146 (emphasis added).

Moreover, Senator Javits could not have adopted Senator Smathers' suggested language exactly because it did not allow employers to bar older employees from participating in employee benefit plans altogether where they could not work for the employer long enough to qualify. Senator Smathers' language authorized "variance" only. In the case of the 55-year-old employee hypothesized by Senator Yarborough in his colloquy with Senator Javits, Senator Smathers' proposed language would have required that the 55-year-old receive a lesser pension if he worked to age 65, whereas the terms of the hypothetical plan bargained by the employer and its union required 20 years of employment for an employee to qualify for a pension.

[12] The guidelines that the Department of Labor issued in 1969 provided that involuntary retirement was permitted by Section 4(f)(2). 29 C.F.R. 860.110(a) (1969); 34 Fed. Reg. 9709 (1969).

intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans." 434 U.S. at 203. In the course of explaining the decision to overturn this result, Senator Javits asserted that the Court had erred by stating that an economic justification was not required to shield discrimination in the provision of employee benefits: "The meaning of the exception, as I stated in a colloquy with Senator Yarborough on the Senate floor, was that an 'employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers.' " 124 Cong. Rec. 8218 (1978), *reprinted in Legislative History* at 539. By that statement, Senator Javits indicated, he had meant that "[w]elfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers" (*ibid.*).

4. Finally, the EEOC's interpretation of Section 4(f)(2) not only comports with the language and legislative history of the Act, it also finds support in important policy considerations. The cost-justification standard imports an objective criterion for determining the scope of the Section 4(f)(2) exemption—whether the disparate treatment of older workers can be justified by significant differences in the costs of providing benefits to older workers. The objective nature of the standard should result in more predictable enforcement, which in turn should encourage voluntary compliance and facilitate long-range planning in the development of employee benefit plans. The cost-justification criterion also supplies a general, neutral standard for assessing all types and varieties of employee benefit plans, regardless of the particular label that may be attached to those plans. Finally, and most importantly, the EEOC's standard follows directly from the ADEA's

anti-discrimination principle. When it costs the same to provide a particular benefit to an older employee and a younger employee, then there is no relevant difference between the two that would justify disparate treatment. But when it costs significantly more to provide a benefit to an older employee, it cannot fairly be said that the two employees are so similarly situated that it would be unfair to differentiate between them in the provision of benefits. The cost-justification standard therefore advances the most basic purpose of the ADEA: ending discrimination against older employees in the workplace.

C. Because Ohio's Public Employees Retirement System Has Offered No Economic Justification For Its Refusal To Pay Disability Benefits To Employees Over Age 59, Its Discrimination Against Older Employees Is Not Shielded By Section 4(f)(2)

PERS has not demonstrated that its disability benefits plan is the sort of plan where costs increase with the age of the participant.[13] Indeed, as the court below stated, "[d]espite having every opportunity, the defendants declined to introduce any cost figures or other economic justification for the different treatment of employees over sixty." J.S. App. A6.[14] That defect is fatal, since Section

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[13] Because Betts had five years of service, she qualified for disability benefits under Ohio law. Ohio Rev. Code Ann. § 145.35 (Anderson 1982 & Supp. 1987). Accordingly, Congress's interest in enacting Section 4(f)(2) to authorize employers to establish legitimate waiting periods before employees are entitled to participate in employee benefit plans, which was stressed by Senator Yarborough in his colloquy with Senator Javits (113 Cong. Rec. 31,255 (1967), *reprinted in Legislative History* at 146), is not implicated by this case.

[14] In its court of appeals' brief, PERS conceded that "[t]here was no evidence before the court concerning the potential increased cost to PERS based on the greater frequency of incidence of disability within the excluded age group." PERS' C.A. Br. 27.

4(f)(2) is an affirmative defense on which the defendant bears both the burden of production and persuasion. *Karlen*, 837 F.2d at 318; *Cipriano*, 785 F.2d at 57-59. In any event, there is no good reason to assume without evidence that disability benefits become more costly as employees get older. While older employees may be more likely to become disabled (a point on which there is no evidence), the court of appeals correctly noted that "the employee who becomes disabled at a younger age should draw more in benefits over the course of his lifetime than the employee who becomes disabled at 60 or older." J.S. App. A6. Thus, it may be that it is actually more expensive to provide disability benefits to *younger* workers.

Nor is PERS' discrimination justified because employees like Betts, unlike younger employees who become disabled, are eligible for retirement benefits under Ohio law. That explanation does not square with the effect of the Ohio statutes, since employees who obtain disability benefits do not cease to receive them when they turn 60. Rather, they continue to receive disability benefits at the rate of at least 30 percent of their "final average salary" (Ohio Rev. Code Ann. § 145.36 (Anderson 1982 and Supp. 1987), even after they turn 60 and become eligible for retirement benefits instead of disability benefits. Thus, contrary to PERS' explanation (Br. 48), the disability plan provides income to employees who have an alternative source of income.

Even if PERS disqualified all recipients from receiving disability benefits once they became eligible to receive retirement benefits, its plan would still not be shielded by Section 4(f)(2). The federal agencies administering the ADEA have concluded that employers may in certain circumstances reduce disability benefits, or replace them with lesser retirement benefits, as recipients age and become entitled to other benefits. But the circumstances in which disqualification is permitted do not include the situation presented here. In 1978, the Department of Labor noted that disability benefits are typically intended "to replace, at least partially, income which an employee would have earned but is unable to earn because of disability." 43 Fed. Reg. 43,266. Requiring disability benefits to continue without reduction until age 70 (the age at which mandatory retirement was permissible at that time), the Department continued, "rests on the unwarranted assumption that a worker who suffers from a long-term disability would, in the absence of the disability, have worked until age 70" (*id.* at 43,267). Data that the Department's Bureau of Labor Statistics had gathered showed that "the most common age at which employees retire is 65" and that, for "individuals still employed at age 60 (or later), the average remaining worklife is about 5 years" (*ibid.*). Accordingly, the Department concluded, employers should be allowed to cut off disability payments "at age 65 for any employee who becomes disabled at age 60 or less" and "5 years after the disability occurred" when employees become disabled after age 60 (*ibid.*).

The EEOC has adopted that approach. 29 C.F.R. 1625.10(f)(1)(ii). Its regulations also note that "[c]ost data may be produced to support other patterns of reduction as well" (*ibid.*). Here, PERS' reduction of benefits does not fall into the safe harbor provided by the regulations, and it has produced no cost data at all to justify its approach.

D. Appellant Errs In Contending That Section 4(f)(2) Authorizes Arbitrary Discrimination Against Older Employees Under Employee Benefit Plans And That Its Plan Is Exempt As A Pre-ADEA Plan

1. PERS contends (Br. 26) that, under Section 4(f)(2), "any plan designed to provide employees with benefits unrelated to salary or wages is exempt from the prohibitions

of the Act, provided the plan was not conceived to avoid the statute's specified purposes of facilitating the employment of older workers." PERS' amici similarly argue that Section 4(f)(2) excuses all discrimination pursuant to an employee benefit plan that is not a sham.[15] That construction, which has no support at all in the many decisions of courts of appeals construing Section 4(f)(2), totally ignores the statutory phrase "such as a retirement, pension, or insurance plan." Indeed, PERS states, contrary to the Third Circuit in *Westinghouse* (725 F.2d at 224), that that phrase "merely provides examples of the plans protected by the exemption; it does not purport to define or qualify it" (Br. 28). But if Congress had not meant to limit the types of plans protected by Section 4(f)(2), it would have omitted the phrase, so that the provision reached employee benefit plans without exception. PERS' construction also ignores the abundant legislative history showing that Congress was concerned, not with all employee benefit plans, but with plans with legitimate waiting periods and plans that provide benefits that cost more for older employees.

Moreover, PERS fails to comprehend that Section 4(a)(1) of the ADEA not only prohibits refusals to hire older employees, it also proscribes "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges or employment because of such individual's age." That prohibition follows from Section 1(b) of the Act, 29 U.S.C. 621(b), which provides that

[15] The National Public Employers Labor Relations Association, for example, contends (Br. 13-14) that an employee benefit plan may discriminate against older employees except where "it is specifically designed involuntarily to deprive older workers of terms and conditions of employment that younger persons enjoy – for example, a plan that is purposefully designed and used as a cover for the involuntary retirement of older persons."

the purposes of the ADEA include "prohibit[ing] arbitrary age discrimination in employment" as well as "promot[ing] employment of older persons." As this Court has stated repeatedly, " '[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all.' " *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (quoting *Hishon* v. *King & Spalding*, 467 U.S. 69, 75 (1984)).

That PERS' construction of Section 4(f)(2) is faulty is made plain by consideration of its effects, since it would allow any sort of discrimination against older employees in the provision of employee benefits. As the Seventh Circuit stated in *Karlen*, if an employer told its employees that "at age 65 you lose your free parking space (or dental insurance, or any other fringe benefit), [it] would be guilty, prima facie, of age discrimination." 837 F.2d at 318. Yet PERS' proposal would authorize just such arbitrary discrimination, since presumably it would not interfere with the "employment of older workers" (Br. 26). Indeed, PERS appears to believe that the fact that it hired Betts at age 55 insulates it from liability as long as it does not arbitrarily terminate or refuse to promote her (Br. 29, 48). If it had cut off her dental insurance or eliminated her parking space, solely on account of her age, and offered no justification for doing so, such acts would be permissible under PERS' construction of Section 4(f)(2), just as it contends that it may deny her disability benefits without providing any cost justification for its discriminatory behavior. But Congress did not intend to authorize employers arbitrarily to discriminate against older persons in the provision of employee benefits.

2. PERS also argues (Br. 16-23) that its plan is exempt from liability under Section 4(f)(2) because it was estab-

lished in 1933. There is no merit at all to that claim. The discriminatory provision in PERS' plan was added in 1976, two years after the ADEA was amended to apply to the States. See 29 U.S.C. 630(b)(2); Pub. L. No. 93-259, § 28(a)(2). Until that time, disability benefits (which are and were generally calculated like retirement benefits under Ohio law) were not required to be at least 30 percent of the employee's final average salary, and hence employees like Betts were not disadvantaged by the provision making them ineligible for disability benefits. Only with the enactment of the 1976 amendment were employees over 60 deprived of a significant benefit available to employees under 60. All of the courts of appeals that have concluded that pre-ADEA employee benefit plans are exempt from its requirements have noted that a different result would follow if, as here, the relevant provision had been added after the enactment of the ADEA. *EEOC* v. *Cargill,* 855 F.2d 682, 686 n.4 (10th Cir. 1988); *EEOC* v. *County of Orange,* 837 F.2d 420, 423 (9th Cir. 1988); see also *EEOC* v. *Home Insurance Co.,* 672 F.2d 252, 259 (2d Cir. 1982).[16]

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[16] Consequently, this Court need not address the question whether all pre-ADEA plans are exempt from the anti-discrimination provision of the Act under Section 4(f)(2). Although this Court in *McMann* (434 U.S. at 197-198, 203) expressed the view that a pre-1967 benefit plan could not be a "subterfuge to evade the purposes of the Act," those statements should not be thought to be binding where Congress has overruled the holding of the case and has indicated its express disapproval of the Court's reasoning (see H.R. Conf. Rep. 950 at 8, *reprinted in Legislative History* at 519). The better view, we think, is that a provision that existed prior to 1967 can be said to be contrary to the Act's *purpose* of eliminating arbitrary discrimination against older employees, even though it could not have been enacted to evade the ADEA itself. Moreover, Congress in 1967 made clear that the Act applied "to new and existing employee benefit plans, and to both the establishment and maintenance of such plans." H.R. Rep. 805, 90th Cong., 1st Sess. 4 (1967); S. Rep. 723, 90th Cong., 1st Sess. 4; *reprinted in Legislative History* at 77, 108.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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